COMMITTEE FOR IDAHO'S HIGH DESERT

IBLA 2002-339 Decided July 16, 2003

Appeal from decision of the Boise (Idaho) Field Office, Bureau of Land Management, denying protests against a Notice of Availability, Decision to Exchange Lands. IDI-34033.

Appeal dismissed.

1. Administrative Procedure: Standing--Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Rules of Practice: Appeals: Standing to Appeal

   In order to become a "party to a case" involving BLM's consideration of a land exchange pursuant to section 206 of FLPMA, a third party must file a timely protest of the proposed exchange as provided in 43 CFR 2201.7-1(b) following BLM's issuance of a notice of its decision. Where a party fails to do so, its appeal from a subsequent BLM decision denying timely-filed protests by other parties and proceeding with the exchange is properly dismissed for lack of standing under 43 CFR 4.410(a), as it was not a party to the case.

APPEARANCES: Katie Fite, Conservation Director, for appellant; Michael A. Ferguson, Acting State Director, Idaho State Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

On February 14, 2002, the Boise (Idaho) Field Office, Bureau of Land Management (BLM), [1/] issued a Notice of Availability (NOA), Decision to Exchange Lands in Ada, Adams, Boise, Canyon, Gem, Payette, Valley, and Washington Counties (the Cascade land exchange), pursuant to section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (2000). The cover letter to the NOA explains:

> This [NOA] is the public notification of the decision by BLM to complete the Cascade Land Exchange with Jerry Thiessen, acting as the authorized representative of Snake River Land Exchange Company. [BLM] prepared an environmental assessment [(EA)] which gives careful consideration to all known issues related to this exchange, reviewed public comments on the [EA] and has determined that it is in the public interest to complete the exchange as outlined in the enclosed [NOA] unless we received information we have not previously considered. The enclosed [NOA] is being set for informational purposes and does not require a response unless you are requesting additional information or are protesting the decision.

(BLM Cover Letter to NOA dated Feb. 14, 2002, at 1.) A copy of the notice was sent to the Committee for Idaho's High Desert (CIHD), among other interested parties.

Two protests were filed by other parties, namely, Cecil Bilbao and Greg and Lori Lindsay, as authorized by 43 CFR 2201.7-1(b). However, CIHD did not protest the exchange, opting instead to wait "for BLM's response to Protest points." (Notice of Appeal/Statement of Reasons (SOR) at 3.)

On May 1, 2002, BLM issued two separate decisions dismissing the protests of Bilbao and the Lindsays and stating its intention to proceed with the implementation of the Cascade Land Exchange.

On May 29, 2002, CIHD filed a NA/SOR "concerning [BLM's] decision of February 14, 2002, for the Cascade Land Exchange" and "associated actions." (NA/SOR at 1). BLM forwarded the appeal to us, and it was docketed here under the above-referenced docket number. On June 28, 2002, BLM moved to dismiss CIHD on the grounds that it was not a party to the case because it did not file a protest after the NOA was issued.

[1/] The decision was issued by BLM's Four Rivers Field Manager, on the letterhead of the Boise Field Office, Lower Snake River District.

The regulations governing appeals to this Board state that "[a]ny party to a case who is adversely affected by a decision" by BLM can appeal to the Board. 43 CFR 4.410(a). BLM contends that because CIHD did not protest it cannot now appeal. BLM cites to our decision in Burton A. McGregor, 119 IBLA 95, 99 (1991), where, in a land exchange context, we noted that "an individual cannot establish that he or she is a 'party to the case' merely by attempting to appeal from the denial of someone else's protest." Id. CIHD acknowledges that it did not protest the decision; however, it suggests that it was already a party to the case thanks to its prior active participation in earlier stages of the decision-making process. The record does indicate that CIHD submitted written comments on at least four occasions, [2/] made comments by telephone, [3/] and met with BLM officials and others involved in the land exchange. [4/] CIHD asserts that "BLM's [February 14, 2002,] letter failed to describe actions necessary to Appeal this decision" and "in no way indicated that it was necessary to Protest this decision in order to be able to Appeal it." (NA/SOR at 2.)

In our leading case on third-party participation before BLM, we stated:

> [T]he purpose of the requirement that an individual be a "party to a case" before a notice of appeal to this Board will lie is not to limit the rights of those who disagree with Bureau actions, but to afford a framework by which decisionmaking at the departmental and State Office level may be intelligently made.
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> If an individual has been a "party to a case" and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual's input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited upon such an individual as a result of its action.

California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977).

Unlike some previous cases where no involvement was shown prior to the filing of a notice of appeal, here CIHD was active in the overall process until BLM

[2/] BLM received letters from CIHD dated Nov. 9, 1999; Mar. 6, 2000; Jan. 23, 2001; and Apr. 24, 2001.

[3/] The record indicates that Katie Fite, CIHD's Conservation Director, had a telephone conversation with a BLM employee regarding the exchange on May 28, 2002.

[4/] BLM acknowledges meeting with CIHD to discuss the land exchange in its June 28, 2002, response to the notice of appeal.

issued its NOD. See Edwin H. Marston, 103 IBLA 40, 42 (1988). The question now becomes whether one must always protest a land exchange notice of decision in order to have standing before this Board on appeal. If what is being appealed is the denial of the protest, then it is logical (as BLM argues) that one person does not have standing to appeal the dismissal of someone else's protest. Burton A. McGregor, 119 IBLA at 99. However, if the final decision being appealed is not the protest denial but the original decision to proceed with the land exchange, then one who has participated at previous levels might, conceivably, already qualify as a party to the case without filing a protest. See Edwin H. Martson, 103 IBLA at 42 ("[I]n order to become a party to a case, one must actively participate in the decisionmaking process which leads to the appeal."). However, as discussed below, we have addressed this question in another context and found that, where the procedure established by regulation provides for one, a protest is required in order to have standing to appeal.

Advertised timber sales are governed by a regulatory structure that is similar to land exchanges, in that, for both advertised timber sales and land exchanges, notice of the decision is published and made subject to protest before BLM. 43 CFR 2201.7-1, 5003.2, and 5003.3. We have previously addressed whether a timber sale notice could be appealed directly to the Board, discussing the relationship between protests and appeals:

> It is clear from the regulations in 43 CFR Subpart 5003 that BLM sought to devise a process whereby objection to its forest management decisions were initially reviewable at the agency level, thus creating an exception to the rule that BLM decisions are appealable directly to this Board under 43 CFR 4.410. Such a system, as it relates to timber sales, allows the agency an opportunity to consider the objections and either cancel the sale, make any required adjustments, or by decision, deny them. A decision denying a timber sale protest is appealable to this Board under 43 CFR 4.410. * * * .
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> By filing an appeal to this Board from BLM's sale notice, appellants have attempted to circumvent the regulatory scheme set out in 43 CFR Subpart 5003.

Sierra Club, Grand Canyon Chapter, 136 IBLA 358, 362 (1996). We proceeded to dismiss the appeal as an untimely protest, expressly ruling that, "[t]o appeal a timber sale notice, a person must first protest that notice to BLM." Id.

[1] The protest process devised for land exchanges is analogous to that for advertised timber sales. In both cases, the Department has established procedures by regulation providing a framework for BLM to provide due consideration of input from third parties while preserving an orderly process for making time-sensitive decisions.

In Sierra Club, we made it mandatory for third parties to package their objections to proposed timber sales into a single presentation styled a "protest" and to present those objections to BLM prior to its decision on the sale. We deem it appropriate to do so as well for land exchange cases. Thus, we hold that the only land exchange appeal that can properly be brought before this Board is an appeal of BLM's protest decision. See 43 CFR 2201.7-1(b) and (c); Burton A. McGregor, 119 IBLA at 99. Since CIHD did not protest BLM's February 14, 2002, exchange decision, it cannot now appeal the exchange. The regulations establishing this procedure are a matter of public record, and CIHD is accordingly charged with knowledge of the necessity under 43 CFR 2201.7-1 to file a protest. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Further, BLM did allude to the possibility of filing a protest in its cover letter to the NOA.

BLM's motion to dismiss CIHD's appeal is granted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, CIHD's appeal is dismissed.

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David L. Hughes
Administrative Judge

I concur:

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James F. Roberts
Administrative Judge